D.B. CIVIL SPECIAL APPEAL (CIVIL) NO.69/2006

(1) Legal Representatives of Aidan Singh, (2) Dungar Singh & (3) Shyam Singh

Vs.

(1) Mohmad Bux and (2) Legal representatives of deceased Aidan Singh.

Date of judgment : 3rd October, 2007

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE SANGEET LODHA

Mr. Arjun Purohit) for the appellants.
Mr. N.K. Vyas)

Mr. R.K. Thanvi for the respondents.

BY THE COURT:- (PER HON'BLE RAJESH BALIA, J.)

This appeal is directed against the order dated 7.9.2005 rejecting the application for restoration of D.B. First Appeal No.160/1991. The said appeal was dismissed for default on 2.2.2005 as no one has appeared for the appellant.

The matter had been listed for orders

because the learned counsel for the appellant had not filed the amended cause title. The respondent decree holder Mohd. Bux had died during the pendency of the appeal. The application for bringing the legal representatives on record had been moved in time and which has not been opposed by the legal representatives of the deceased decree holder and the same was allowed by the Court vide order dated 24.9.2004. However, the amended cause title had not been filed and the case had been listed only because that amended cause title had not been filed. The legal representatives had been brought on record by an application duly made in time and also because the application has been moved by the learned counsel for the legal representatives of Mohd. Bux.

It is in the aforesaid circumstances, when the appeal was dismissed for want of prosecution because the learned counsel has not appeared when the matter was called out for orders, an application was moved for restoration of the appeal. The application for restoration was submitted along with affidavit of the

learned counsel that by inadvertent mistake the case could not be marked by him on the date when the matter was listed for orders and dismissed for his non-prosecution. This was not considered by the learned Single Judge to be sufficient cause for allowing the restoration application and the same has been dismissed. Hence, this appeal.

Two fold objections have been raised by the learned counsel for the legal representatives of Mohd. Bux that in the application, the name of party respondent has been mentioned as Mohd. Bux, who died during the pendency of the appeal and, therefore, the application for restoration is against the dead person and secondly he raised objection that if the application is allowed, it should be with costs.

So far as said objection is concerned we fund that an application for correcting the particulars of the respondent No.1 has been filed by citing all the names of the legal representatives as a part of cause title,

which application is allowed.

So far as first objection is concerned, we find that the legal representatives had already responded to the notice as they were already brought on record of the appeal by moving application for bringing them on record in time both by themselves as well as by the appellant. Therefore, they are already on record of the appeal. The appeal was properly constituted.

The first appeal had been dismissed for default for filing the amended cause title subsequent thereto. The amended cause title has been submitted in this appeal.

In these circumstances, in our opinion, penalizing the litigant for negligence of the counsel, at best, would not be in the interest of justice and depriving him the right of to be heard on merit of appeal when this sort of negligence can appropriately be compensated by awarding cost. Moreover, when the parties were brought on record of the appeal and it was

not listed for hearing and the legal representatives representing the estate of the deceased too had already put in appearance, in this appeal also merely for a formal defect, we are not inclined to allow the right of appellant to be heard on merit to be forfeited for the default of the counsel.

In these circumstances, the special appeal is allowed. The judgment under appeal is set aside. The restoration application moved by the appellant is also allowed and the Regular First Appeal No.160/1991 is restored to its original number. The amended cause title has been filed in this appeal is to be placed on record of the first appeal and the appeal. However, in the facts and circumstances of the case, the respondent No.1 is entitled to cost. We had already directed at the time of issuing notice that since this situation has arisen on account of personal fault of the lawyer, he shall deposit a cost of Rs.2,500/- which is not to be charged to the litigant. The amount has been deposited with the Dy. Registrar (Judicial), it may be paid to the learned counsel appearing for resplendent No.1. The special

appeal accordingly stands disposed off.

It is stated by the learned counsel for the respondent No.1 that his dispute with Aidan Singh has been compromised. He has settled the dispute with Aidan Singh out of the Court. The learned counsel for the appellant stated that the said comprise with Aidan Singh does not amount to compromise with the other appellants, the sons of Achal Singh.

The compromise which has been arrived at between the respondent No.1 and legal representatives of Aidan Singh may be placed on record of the first appeal.

The first appeal may be listed for orders on the application moved by the respondent No.1 about the compromise of the case for appropriate orders.

Put up on 26th November, 2007 as agreed to by both the learned counsel.

[SANGEET LODHA], J. [RAJESH BALIA], J.

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